

[To be reported by Lord HAILES.]

72

BILL of ADVOCATION,

Mrs STEWART-NICOLSON, *(Mrs S.)*



A G A I N S T

Houston STEWART-NICOLSON, Esq;

MY Lords of Council and Session, Unto your Lordships humbly means and shews, your servitor, Mrs Margaret Porterfield, spouse of Houston Stewart-Nicolson, Esq; of Carnock, That WHERE, in the process of divorce, presently depending before the commissaries of Edinburgh, at the instance of my said husband, against me, the commissaries were pleased, upon the 4th of July last 1770, to pronounce the following interlocutor: "The commissaries having considered the
" objections offered for the defender, against Sir William Maxwell, Lady Maxwell, William Graham, Latchemo the negro, and
" John Busby, witnesses proposed to be adduced on the part of
" the pursuer, with the answers made by the pursuer to these objections, and replies to the said answers, together with the writs
" produced, and proof referred to in support of said objections
" and answers; and having also considered the depositions *in causa*
" of the witnesses already adduced on the part of the pursuer; allow
" Sir William Maxwell to be examined *cum nota*; as also allow
" Lady Maxwell to be adduced, reserving to the defender to put
" such interrogatories to her *in initialibus* as may further tend to
" support the objections to her testimony, and reserving to the
" commissaries to judge of the import of the witness's answers to
" these interrogatories, and likewise to judge what credit is due
" to her testimony in case she shall be admitted. Find the objections stated against the evidence of the said William Graham
" not competent at the defender's instance; and therefore repel
" the said objections, and allow the witness to be adduced; refer-
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“ ving to him, in case he thinks fit, to object to his own exami-
 “ nation, or to the interrogatories to be put to him; and to the
 “ court to judge of the import of his objections, if any such are
 “ offered, as accords. As to Latchemo the negro, before answer
 “ appoint him to appear in court, in order to be examined upon
 “ the articles of his faith. And find, That the said John Busby
 “ cannot be examined as a witness upon any facts that have come
 “ to his knowledge since the time he was employed as an agent in
 “ this cause; and in so far sustain the objection stated against
 “ him.” And to this interlocutor, the commissaries, upon the
 15th of August last 1770, adhered, “ with this explanation, that
 “ they reserved to themselves to judge what degree of credibility
 “ shall be given to the evidence of William Graham, in the event
 “ of his being examined as a witness in the cause:” MOST
 WRONGOUSLY AND UNJUSTLY, as will appear to your Lordships
 from the following state of the case. — I was married to Mr Ni-
 colson in 1764, and bore a son to him within a year after the
 marriage. I was then very young. My husband, both before
 and after marriage, professed for me the strongest regard and at-
 tachment, as indeed the match had taken its rise from no other
 motive than that of mutual inclination. I had the satisfaction of
 living upon the best terms with his relations, particularly with
 his sister Lady Maxwell of Springkell, who was earlier married,
 and somewhat more advanced in years, but who all along seemed
 to have a great regard for me. In summer 1768, I received invi-
 tations from Lady Maxwell, to pass some time with her at the
 house of Springkell in Dumfries-shire. I complied with this re-
 quest; and in the last week of July, my husband and I arrived at
 Springkell, along with Mr Archibald Stewart, his younger bro-
 ther; and where we likewise found his elder brother Mr Schaw
 Stewart. Mr Archibald remained there about ten days; my hus-
 band set out for the shire of Air in about a fortnight; and Mr
 Schaw continued at Springkell for five or six weeks. Sir William
 Maxwell set out also for Air to attend the races in the month of
 October; and, among other servants, carried William Graham
 along with him. Sir William and his servants returned about
 the end of that month, after the races were over. My husband
 returned in the beginning of November; and, towards the mid-
 dle of that month, he and I set out for his house of Carnock in
 Stirlingshire. While at Springkell, I had frequently occasion to
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see William Graham. He was employed by Sir William as an upper servant or grieve; he kept the accounts of the family, superintended the other servants, walked out with the children, and seemed to be much in favour both with Sir William and his Lady. He had been long in their service, brought up in it from being a stable-boy; and his father was one of Sir William's tenants. I do remember to have frequently spoke with William Graham, which I was naturally led to do, as well as Lady Maxwell herself, from his situation in the family. It was common to apply to him to make or mend pens, and to do other little offices of that kind; and I remember to have conversed with him once or twice about a horse, which I was desirous my husband should purchase for me: but further than this I had no connection with William Graham. During my whole stay at Springkell, Lady Maxwell and Sir William behaved to me in the same kind and agreeable manner, and professed the same favourable opinion of me, which they had always done. When I returned to Carnock, I received letters from Lady Maxwell, which are produced in process; but which do not discover, either in their style or matter, any symptom of her entertaining suspicions of my conduct. They are filled with little family-anecdotes, extremely natural between two sisters living in the strictest friendship, and having a confidence in each other; but very unnatural, if one of these sisters should be supposed, at the time, to have been satisfied, or even to have entertained suspicions, that the other had been guilty, under her roof, of the most disgraceful and criminal act of which a woman can be accused. The first of these letters bears date 29th November 1768, soon after I left Springkell; and the last of them is dated 4th May 1769. Upon the 1st August 1769, I was delivered of a second son at my husband's house of Carnock; and about that time, or soon after it, Lady Maxwell set out upon a visit to her father Sir Michael Stewart, then living at his house of Ardgowan in Renfrewshire. Sir Michael had at the time his whole family with him, viz. his three sons above mentioned, and Lady Maxwell, his only daughter; and, if I am not misinformed, he had then in view to make settlements of his estate. What passed between Lady Maxwell and Sir Michael in private, I shall not pretend to inquire; but so it is, that after they had been some time together, my husband being in the house with them, and I at a distance nursing my child at Carnock, the foundation of this process

process was laid. I was accused by Lady Maxwell to Sir Michael, and by Sir Michael to his son the pursuer, of having been unfaithful to the marriage-bed, and that the child upon my breast was spurious. That such was in general the way and manner in which this accusation was broached, I have good reason to say and believe; because the pursuer himself, surprised at the intelligence, took his horse immediately, and rode to my father's house at Duchal in Renfrewshire, where he told what had passed; and produced to my father and mother, and the whole family there, a slip of paper of his father's hand-writing, in which Sir Michael assured him, that the information he had received, had determined him to make his settlements in such manner, as to exclude the child of which I had been lately delivered. This was the first hint which any of my friends had of so cruel an accusation; and it was some time longer before I came to be informed of it. In the mean time, Lady Maxwell, it would seem, emitted a declaration upon the subject: for upon the 4th November 1769, she writes to my father a letter, produced in process; in which, among other things, it is said, "When you believe your daughter
 "innocent, you must of course believe me guilty; and in defend-
 "ing her, I well know I must suffer. I confess it is natural, ve-
 "ry natural, for you to defend her. I expected it; I have
 "foretold it: but you must allow it is equally so for me to
 "vindicate myself: therefore, since matters are come so far,
 "I frankly own, that I shall not be easy till I have attested most
 "solemnly, by oath, what I have already declared on this sub-
 "ject." A process of divorce, upon the head of adultery, was accordingly commenced against me, where I am charged, in the libel, as having conceived a criminal passion for a young man, then in Sir William Maxwell's family, of a rank and station much inferior to mine; and that I had perpetrated the crime of adultery with him. In this process, the pursuer having been appointed by the commissaries, and which judgement was affirmed by your Lordships, to condescend upon the person with whom he charged me to have been guilty of the crime of adultery, William Graham was condescended upon as the guilty person; and to him alone the charge was confined. Springkell was condescended upon as the place where the crime was committed; Lady Maxwell, Sir William, and the servants, and others, at Springkell, and particularly William Graham, the supposed guilty person, as the witnesses
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by whom it was to be proved. As I considered it, however, to be a duty which I owed to myself, and my reputation in the world, to be attentive to the evidence that was to be adduced against me, and not to allow an erroneous charge of so heinous a nature to be raised up against me upon suspicious or improper testimony; so I took the liberty to submit to the commissaries, that, of the list of witnesses that had been exhibited, neither Lady Maxwell, nor Sir William, nor William Graham, nor Latchemo, a negro-slave belonging to Sir William, nor John Busby writer in Dumfries, who, since the first commencement of the affair, had been employed as an agent for me, could be admitted as witnesses against me. And the commissaries, upon advising objections for me, and answers for the pursuer, with replies, pronounced the interlocutors above recited; in which, I apprehend, they have committed manifest iniquity. And, *first*, With respect to Sir William Maxwell, I am advised, that he cannot at all be admitted as a witness in this cause. The commissaries have only "allowed" Lady Maxwell to be adduced, reserving to the defender to put "such interrogatories to her *in initialibus*, as may farther tend to "support the objections to her testimony;" and I cannot conceive a good reason why they have given a different judgement as to Sir William: and, indeed, without farther proof, sufficient objections do occur to debar either the one or other from being admitted. However, as the commissaries have not allowed Lady Maxwell to be examined *in causa*, I do not propose at present to trouble your Lordships with my objections to her. When she comes to be produced before the commissaries, the objections against her, and evidence of them, will then be judged of together. But with respect to Sir William, as the commissaries have allowed him to be examined *cum nota*, I must humbly contend, that his evidence is not at all admissible in this case, For, *imo*, The law of the land debars him from being a witness, on account of the relation in which he stands to the pursuer. A brother or brother-in-law are held in that degree of suspicion, that they cannot be received even in ordinary civil cases; far less in a question of so interesting a nature, and attended with such serious consequences. Witnesses in the foresaid degree of relation, were clearly inhabile by the Roman law; they are likewise inhabile by the law of this country. They are contained in the list of inhabile witnesses in the stat. 2d Robert I. chap. 34.; and in sundry cases

ses it has been found by the court, that even being related in an equal degree to the other party does not remove the objection. *2do*, A separate legal objection does likewise lie against Sir William's being admitted as a witness, viz. That he has an interest in the issue of the suit. This interest is evidenced by the note which the pursuer himself was pleased to show, with regard to Sir Michael Stewart's settlements. The *spes successionis* which Sir William's family have to Sir Michael's estate may be nearer, or more remote, according to the issue of this question. If my character shall be vindicated in the course of this process, I and my husband may again live together, and have many children; whereas, if suspicions can be raised, and these suspicions can be any how supported, and the pursuer's affections shall thereby continue to be alienated, any chance of that kind will be at an end. Sir William may have the best character in the world; but the law holds him to be an improper witness, in every cause where it can be qualified that he has an interest in the event of it. The law makes no distinction of persons in a question of this kind. And it would be very inexpedient that it should: It would, in every such case, lead into a disquisition into characters, which would be highly improper. The law holds mankind in general to be subject to bias where their own interest is concerned; and where any person can be qualified to have an interest in a cause, the law holds every person under such circumstances, without distinction, to be an inhabile witness. *3tio*, Independent of the foresaid two objections, the circumstances of the case, as above stated, do afford a most substantial ground for rejecting Sir William's testimony. Lady Maxwell, the wife of this witness, has stated herself, in point of character, as a party in this cause. In the letter above recited, she writes Mr Porterfield, " If the defender is innocent, you must, of course, believe me guilty; " and in defending her, I well know I must suffer, &c. I *shall* " *not be easy* till I have attested most solemnly, by oath, what I " have already declared upon this subject." Here your Lordships will perceive, that Lady Maxwell's character is, by herself, considered to be at stake. She considers the cause to be so far her own, that, by the event of it, her character must stand or fall. It is plain, that this would be a sufficient objection, *per se*, to reject Lady Maxwell's testimony. And, in a case of this kind, the law does not distinguish betwixt the case of the husband and wife.

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If the wife could not be admitted on account of her taking a part in the cause, I cannot perceive, that, by any rule of law, the husband's testimony can be received. And, *4to*, It appears, by proof already taken, and farther proof, if necessary, can be produced to show, that this witness has assisted in taking the declaration of other witnesses; and it has always been understood to be an unfurmountable objection to a witness, that he has given partial counsel in a cause. Neither is it enough to say, that adultery being a fact generally committed in secret, witnesses otherwise inhabile or suspicious, ought to be received for establishing it. This would be a most dangerous doctrine, if applied to such cases as the present. In proving facts of a domestic nature, and such as naturally fall only to be known to near relations, those who would be inhabile in common cases, have been received; but that will by no means apply to this case. The commission of adultery is none of the facts which naturally fall to be established by near relations; on the contrary, it is from them that the greatest care is taken to conceal it; and they are commonly the last persons in the world who become acquainted with it: so that expediency does by no means require, that witnesses otherwise inadmissible ought to be received in proving the crime of adultery. The common rule of law is, That *in causis criminalibus testes debent esse omni exceptione majores*; and as it is impossible to figure any case, which involves in it consequences deeper or more interesting than that of divorce, on the head of adultery, it is submitted to your Lordships, if it would not be against every rule of law and of justice, to admit inhabile or suspicious witnesses. And it is further submitted, if the objections above stated are not, jointly and severally, relevant to reject Sir William's testimony in this case. The commissaries have, in the *next* place, found, That "the objections stated against the evidence of the said William Graham, are not competent at the defender's instance; and therefore repel said objections, and allow the witness to be adduced; reserving to him, in case he thinks fit, to object to his own examination, or to the interrogatories to be put to him; and to the court to judge of the import of his objections, if any such are offered, as accords." It is submitted to your Lordships, if this part of the interlocutor is not likewise erroneous; and that this witness can by no means be received. This William Graham is the son of a petty tenant or dependent of the family of Springkell, brought up

up about that family, first a stable-boy, then a footman, afterwards Sir William's own servant, lately promoted to be a grieve or clerk, with the promise of a farm. It has been already observed, that the relation in which Sir William and my Lady stand to the pursuer, renders them inhabile witnesses; that Sir William and my Lady have a plain and obvious interest in the issue of the cause; that their patrimonial interest may be affected by it; that they have given partial counsel in the cause; and that my Lady does so far acknowledge the cause to be her own, that she considers her character to depend upon the issue of it. It must occur to your Lordships, that, under these circumstances, William Graham, who stands so closely connected with the family of Springkell, in manner already stated, cannot be an impartial or unbiassed witness in this cause. It is even submitted to your Lordships, if the connection he stands in to the family, of being a menial servant, and dependent upon them, does not even afford a legal objection to his evidence, in a cause in which the family are not only patrimonially interested, but which they have espoused, and do actually consider as their own: and it will not be matter of surprise, that, in a cause of so serious a nature, and so interesting in its consequences, I should be anxious that persons under such suspicious circumstances should not be admitted as witnesses against me. But, *2do*, Independent of his connection with Sir William Maxwell's family, other circumstances do occur which afford an undoubted legal objection to his evidence. Your Lordships will observe, that William Graham is the person with whom I am charged as having been guilty of the crime upon which the present action is founded, and to whom alone the condescendence restricts the charge. The pursuer cannot be allowed to ask a single question at this witness tending to load me with guilt with any other person: he therefore must load himself with guilt, otherwise he can say nothing to the issue. Hence, *1mo*, The objection of *socius criminis*, *i. e.* being charged with the same crime, does lie against him. The common rule of law is, That such cannot be received; and any exceptions which the law has made in particular cases, only tend to confirm the rule. A person in that situation is not a free agent: he cannot open his mouth, without either condemning or acquitting himself of a crime. *2do*, I am advised, that by the law of this and every other civilized nation, infamous persons are

are disabled from being witnesses; and it is equally clear, that all public crimes are, by the operation of the law itself, stigmatized with infamy. Theft, robbery, and adultery, are of this class. In our statutes of King William, cap. 11. *De his qui notantur infamia*, this is expressly laid down: "Infames dicimus omnes illas personas esse, qui pro aliqua culpa damnantur notabili," &c. — § 5. "Similiter incestuosos, perjuros, homicidas, receptatores malefactorum, adulteros," &c. — § 7. "Hi omnes supra dicti, nec ad sacros ordines promoveri debent, nec ad accusationem vel testimonium admitti." Nor is it any answer to the objection, that conviction is necessary in order to infer infamy. For it is not the sentence of the judge that inflicts infamy, but the infamy does attend the commission of the crime; and the sentence of the judge is only necessary for ascertaining the fact, as, in most cases, the fact can only be held as proved, when it is found so by a sentence of a judge. But your Lordships will observe, that in this particular case no sentence of a judge can be necessary for establishing the fact. For as the pursuer's condescendence is limited to Graham alone, no evasive manner is left of putting the question, so that an explicit confession of his own guilt can be avoided; and therefore the very proposition of making him a witness, infers a direct disability in him to be produced as such. It is impossible that he can say any thing to the issue without loading himself; whether truly or falsely, is nothing to the present argument. The very same moment that he swears against me, he judicially charges himself with a guilt which, by his own confession, in law, operates the same thing as condemnation; and includes that infamy which grounds a legal and solid objection against his testimony. But, 3^{tio}, It is a clear and an established rule in law, founded on the principles of humanity and justice, That *nemo tenetur jurare in suam turpitudinem*: No man is bound to accuse himself; or, when adduced as an evidence, to swear to any fact that has the least tendency to load him with the imputation of a crime. Accordingly, in the late question before the court, betwixt Sir Alexander Grant and the magistrates and council of Fortrose, relative to the reduction of the election of the magistrates and council of that borough, upon the head of bribery and corruption, the interrogatories to be put to the witnesses were so adjusted by the court, that they could not be obliged to load themselves; but in every question respecting bribery, it was

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always put with exception of the witness himself. He was not obliged to open his mouth with respect to any act of bribery in which he himself had any concern, but only as to such acts of bribery in which third parties, and not himself, were concerned. And Colonel Munro having been proposed to be adduced by the complainers, your Lordships found, That he could not be adduced at all as a witness, because he was charged as the author and promoter of the whole scene of bribery and corruption which in that case was charged against the defenders; and as such questions only ought to be put to witnesses as were pertinent to the point in issue, no pertinent question could, in that case, be put to the Colonel, but what must have had a tendency to load himself with an accession to the crime of bribery and corruption. This applies precisely to the case of William Graham. The crime of adultery charged against me has been confined by the pursuer to William Graham alone; so that it is impossible that a single pertinent question can be put to William Graham, but what must have a plain and direct tendency to load himself with the crime of adultery. It is therefore a clear case, that William Graham cannot in this case be obliged to answer a single question, more than Colonel Munro could be obliged to answer in the case above mentioned. And indeed the commissaries seem to have found so. This being the case, it is plain, that William Graham would be an ultroneous witness as to every question which he should think proper to answer, as he had a good legal defence against opening his mouth. The being an ultroneous witness, has always been understood as a good objection. The law does presume, that a witness appearing under such circumstances had made the cause his own; and had, some how or other, been privately interested in it, so as to render him a most suspicious and exceptionable witness; and that therefore it would be doing an act of injustice to the other party to allow him to be received. This objection, with submission, can never appear in a stronger light than the present. For if William Graham is not bound to open his mouth in this cause, it is impossible to suppose, that a witness so circumstanced should wave the objection confessedly competent to himself, in order, not only to establish a charge against his supposed paramour, heinous in its nature, and of the greatest importance to her in its consequences, but also to load himself with a very high crime, and severely punishable, without, at the same time,

time, supposing, that he himself is very particularly interested in the issue of this cause, and that he has been most unduly influenced and corrupted to give evidence. These are presumptions clearly founded in law, reason, and the common apprehensions of mankind. It is impossible for any man living to believe, that William Graham, under these circumstances, would give evidence, when it is in his power to decline it, without having been actuated by most improper motives; and his situation and connection, as already explained, with the family of Springkell, who are not only nearly connected with the pursuer, but who appear to consider the cause as in some measure their own, would clearly point out this to be the case, if William Graham was to step forth, and offer his evidence in this matter. So that, upon the whole, when the whole circumstances above mentioned are considered, it is humbly submitted to your Lordships, if there does not concur most sufficient reasons for rejecting his testimony altogether. Accordingly it is believed, that this objection has in no case been insisted in, and rejected: on the contrary, in the only case where it appears to have been under the view of the court, viz. that of Carruthers of Dormont, in 1742, the objection was sustained; and it was found, That the person with whom the crime was supposed to have been committed could not be examined as a witness for either party. As to Latchemo the negro, the commissaries have, before answer, appointed him to appear in court, in order to be examined upon the articles of his faith. In this, I am advised, the commissaries have likewise committed iniquity: for that this witness is absolutely inadmissible; and that therefore he ought to have been rejected by the commissaries: For that, *1mo*, He is a slave; and, *2do*, That he is not a Christian. With respect to the *first*, Had this witness been the slave of the pursuer, there could have been no doubt of the validity of the objection; and as it has been already shown, that his master and mistress are closely connected with the pursuer, have a patrimonial interest in the cause, and that his mistress, in particular, considers this cause as her own, it is submitted, if the objection does not fall to be considered in the same light as if he was the slave of the pursuer. But, independent of this, the other objection which does here occur against him, viz. That he is not a Christian, is unquestionably relevant. A person who is not a Christian cannot be sufficiently impressed with the oath that a witness must take in this cause.

cause. The very form of the oath that is taken in the commissary-court intimates, that the person taking it is supposed to be a Christian. He must kneel, and lay his hand upon the Holy Evangelists, and swear to declare truth, as he hopes to shun the curses in that book, and to share the blessings contained in it, &c. I am therefore advised, that this witness, who confessedly has not been baptized, and consequently is not a Christian, ought to have been rejected by the commissaries. His being a good or bad witness, ought not to depend upon what answers he may make upon an examination, after having got a catechism put into his hands *pro re nata*. And therefore, upon the whole, I submit it to your Lordships, That the commissaries have done wrong, in not sustaining the objections that were offered against Sir William Maxwell, William Graham, and the negro; and that the cause should be advocated from the commissaries, to the purpose and effect of being remitted to them, with an instruction to find, That none of the foresaid three persons can be admitted as witnesses in this cause. THEREFORE I beseech your Lordships for letters of advocacy on the premisses, in common form. ACCORDING TO JUSTICE, &c.

JOHN RUSSELL.

“ *Edinburgh, November 14. 1770.* The Lord Ordinary, of
 “ consent of the counsel upon both sides, allows the com-
 “ plainter, Mrs Margaret Porterfield, to see the answers to this
 “ bill for Houston Stewart-Nicolson, and to reply thereto, if she
 “ thinks it necessary, and to lodge the reply in the clerk’s hands on
 “ or before Thursday the 22d current; and allows Houston Stewart-
 “ Nicolson to duply to Mrs Margaret Porterfield’s reply, if neces-
 “ sary, and to lodge them in the clerk’s hands upon Tuesday
 “ the 27th current; and in the mean time appoints this bill, with
 “ the answers, replies, and duplies, (if any made), with the proof
 “ before the commissaries, to be printed, and to be put in the
 “ Lords boxes upon Friday the 30th current, in order that this
 “ question may be reported to the court.

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“ DAV. DALRYMPLE.”